

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4                   CHRISTOPHER MOEHLER, MICHAEL COLE,                 )  
5                   STEVE DARNELL, VALERIE NAGER,                 )  
6                   JACK RAMEY, DANIEL UMPA, and                 )  
7                   JANE RUH, on behalf of themselves                 )  
8                   and all others similarly situated,                 )  
9   )  
10                  Plaintiffs,   )  
11                  vs.   ) No. 1:19-cv-01610  
12                  THE NATIONAL ASSOCIATION OF                         )  
13                  REALTORS, REALOGY HOLDINGS CORP.,                 ) Chicago, Illinois  
14                  HOMESERVICES OF AMERICA, INC.,                 )  
15                  BHH AFFILIATES, LLC,                             ) November 2, 2020  
16                  HSF AFFILIATES, LLC, THE LONG AND                 )  
17                  FOSTER COMPANIES, INC.,                         )  
18                  RE/MAX LLC, and KELLER WILLIAMS                 ) 1:34 p.m.  
19                  REALTY, INC.,   )  
20   )  
21                  Defendants.   )

TRANSCRIPT OF PROCEEDINGS - TELEPHONIC STATUS HEARING  
BEFORE THE HONORABLE ANDREA R. WOOD

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1 (Proceedings heard in open court:)

2 THE COURT: Good morning. This is Judge Wood.

3 Hopefully, everybody's able to hear me okay. I should say,  
4 "Good afternoon," I guess. It's 1:30.

5 We'll get started. I'm going to ask my courtroom  
6 deputy to call the case for the record, and then we will go  
7 around and see who all we have on the line.

8 David.

9 THE CLERK: 19 C 1610, Moehrl, et al. versus the  
10 National Association of Realtors, et al. for status.

11 THE COURT: Okay. Who do we have representing the  
12 plaintiffs?

13 MS. FRANKLIN: Good morning, your Honor. This is  
14 Beatrice Franklin from Susman Godfrey on behalf of the  
15 plaintiffs.

16 MR. BRAUN: Your Honor, you've also got Robert Braun  
17 from Cohen Milstein representing the plaintiffs.

18 MR. PIERSON: This is Kit Pierson from Cohen Milstein  
19 for the plaintiffs.

20 MR. SELTZER: Good afternoon, your Honor.  
21 Marc Seltzer for the plaintiffs.

22 MR. PIERCE: Rio Pierce from Hagens Berman for the  
23 plaintiffs.

24 THE COURT: Okay. Do we have any other plaintiffs'  
25 counsel who need to make an appearance this afternoon?

1           I'm not hearing from anybody so let's turn to the  
2 defendants. National Association of Realtors, who do we have  
3 on the line?

4           MR. BIERIG: Good afternoon, your Honor. Jack Bierig  
5 for the National Association of Realtors with the firm of  
6 Schiff Hardin.

7           THE COURT: And do you have any cocounsel on the line  
8 with you, Mr. Bierig?

9           MR. BIERIG: I don't believe so, Judge.

10          THE COURT: Okay. How about Realogy Holdings Corp?

11          MR. KLIEBARD: Good afternoon, your Honor. It's  
12 Ken Kliebard of Morgan Lewis for Realogy Holdings Corporation.

13          MS. MAHONEY: And Your Honor, you also have  
14 Stacey Anne Mahoney from Morgan Lewis as well for Realogy.

15          Thank you.

16          THE COURT: And for HomeServices of America, Inc.?

17          MR. VARON: Good afternoon, your Honor. It's  
18 Jay Varon from Foley & Lardner. And I think Rob MacGill from  
19 MacGill PC is also on. And my partner Jennifer Keas from  
20 Foley is also on for all of the HomeServices defendants which  
21 is HomeServices of America, HSF Affiliates, BHH Affiliates and  
22 Long and Foster, the Long and Foster Companies, actually.

23          THE COURT: Very good. Thank you.

24          Do we have counsel for Re/Max?

25          MS. RENDER: This is Paula Render for Re/Max, and my

1 partner Jeremy Gray is also on the line for Re/Max, and we're  
2 from Jones Day.

3 THE COURT: And what about Keller Williams?

4 MR. RAY: Good afternoon, Your Honor. This is  
5 Timothy Ray. We also have Dave Kully and Anna Hayes on the  
6 line all from Holland & Knight.

7 THE COURT: Okay. Have I actually exhausted all of  
8 the parties? Are there any other counsel on the line who need  
9 to make an appearance this afternoon? I'm not hearing from  
10 anybody so let's proceed.

11 So I have reviewed the parties' status report. I  
12 hope this isn't a harbinger of difficult times ahead in terms  
13 of the parties' ability to agree on various issues.

14 We'll start with the things that the parties agreed  
15 on out of the gate which is that the Rule 26(a) disclosures  
16 and answers will be served on November 16th of 2020.

17 I take it the parties are still comfortable with that  
18 date?

19 MS. FRANKLIN: Yes, Your Honor.

20 THE COURT: Not hearing any objection. Okay. Good,  
21 good.

22 And in general, if I ask a question and I don't hear  
23 anybody jump in to object, I'm going to assume that you're  
24 comfortable with whatever the proposal is.

25 Given the number of people that we have on the line

1 and the many disputed areas in the parties' proposed schedule,  
2 I think I'd like to ask a few pointed questions, and then I'll  
3 probably mull over the answers a little bit and issue a  
4 separate scheduling order after the hearing; but there are a  
5 couple of things that I'd like to get a better idea of.

6 I think the first major area of dispute is, of  
7 course, how long it's going to take to get all of the  
8 documents, including the transaction data, produced here.

9 Let me ask this. So the defendants are proposing a  
10 date of July 1st of next year, so that's about eight months,  
11 to complete the production of just the transaction data. And  
12 there's a reference in the status report to just the  
13 difficulty of pulling this data because of the different  
14 systems involved and the need to have somebody review it.

15 Is there somebody on the defense side -- perhaps  
16 maybe this is a HomeServices issue given that I think that was  
17 the defendant who expressed the most concern about the  
18 plaintiffs' timeline for document production so perhaps I'll  
19 start by seeing if someone from HomeServices can sort of  
20 explain to me why it's going to take so long to pull together  
21 the transactional data.

22 MR. VARON: Yes, Your Honor. This is Jay Varon from  
23 Foley. I'll try and address that.

24 Your Honor is right that there is a very  
25 decentralized system. There are four HomeServices defendants.

1 One of them is a brand new defendant, Long and Foster, which  
2 is a large, mid-Atlantic, regional brokerage; and in general,  
3 there are 12 HomeServices subsidiaries that potentially have  
4 commission data that would be relevant to the 20 alleged MLS  
5 markets at issue that cover 14 states and the District of  
6 Columbia.

7           And each of these subsidiaries are decentralized.  
8 They have typically different accounting systems, different  
9 transaction management systems. I think we said there are  
10 maybe 13 enterprise resource performance systems and about 11  
11 different transaction management systems; and they have  
12 different types of software, different accounting systems,  
13 different people operating them, sometimes third-party  
14 vendors, sometimes in-house vendors. There are different  
15 points of contact.

16           And Your Honor may hear all that and go, "Well, you  
17 know, why eight months?" And I think the answer is that we  
18 look to Sitzer for a parallel, and in Sitzer, we were dealing  
19 with really just Missouri commission data, four small MLS  
20 markets in Missouri, and our franchise companies, HSF and BHH,  
21 were able to produce franchise data for Missouri that they  
22 had.

23           There were two Missouri subs that were commonly  
24 managed but had different systems, and the two franchisors  
25 were able to produce franchise data.

1           It took six months to do all the things that we're  
2 saying would be necessary here; and, of course, in this case,  
3 we have 12 subsidiaries, and the franchisors have to get the  
4 data for 14 states and the District of Columbia with the same  
5 kind of problems.

6           So we didn't multiply it out proportionally, but we  
7 do think that even though we may have learned some things from  
8 the Sitzer experience that eight months as opposed to the six  
9 that it took in Sitzer is really quite reasonable, and we  
10 don't think we could do much better on the transactional data  
11 and the commission side.

12           THE COURT: Is all of that data maintained  
13 electronically as far as you know?

14           MR. VARON: A lot of it is maintained electronically  
15 in different systems but in disparate systems in different  
16 places. And there may be some paper data that may or may not  
17 be different, but we also, Your Honor, are dealing with legacy  
18 systems.

19           You know, the plaintiffs, I think, want to go back to  
20 at least 2015, if not before, and so some of the systems that  
21 we have are old systems and even more difficult to penetrate.

22           THE COURT: And so it's not possible to develop some  
23 sort of an algorithm that would allow you to run a search that  
24 would cover most or all of the systems? And we're talking  
25 about, I take it, your franchisees, not necessarily for other

1 defendants that may have their own issues?

2 MR. VARON: Well, not exactly, Your Honor. I'm glad  
3 you asked.

4 To clarify, HomeServices has kind of two distribution  
5 systems, if you will. They have 12 wholly-owned subsidiaries  
6 in this general market that is alleged in the case, and they  
7 also have dozens, if not more, franchisees that are run  
8 through a franchise network.

9 So in contrast to some of the other defendants, for  
10 example, Re/Max and Keller Williams are mostly -- in fact, I  
11 think they're exclusively just franchisees. Realogy is more  
12 similar to us, but we have these additional subs that are  
13 independently-operated, decentralized systems so I don't think  
14 that is possible.

15 THE COURT: And in suggesting an additional month  
16 until August 1st of 2021 for the complete production of  
17 documents, I take it that defendants are planning on or would  
18 be planning on searching for and producing other types of  
19 documents and data at the same time that you are searching for  
20 transactional data. In other words, you're not planning on  
21 starting that search on July 2nd.

22 MR. VARON: No. That's precisely right, Your Honor.  
23 We would be doing the same thing. And again, the issue is  
24 that plaintiffs have sent all the corporate -- all the  
25 defendants very comprehensive, we would say very broad

1 document requests seeking every piece of information you can  
2 imagine about the real estate industry. And, you know, they  
3 define defendants as comprising every sub, every affiliate,  
4 every parent company, every former director, officer, employee  
5 and agent.

6 They have requests such as all documents and data  
7 concerning actual, projected, estimated, planned conditions in  
8 the markets for residential real estate in the US and  
9 internationally including competition, market shares,  
10 competitive positions, agent/broker commissions, residential  
11 real estate costs, supply, demand, profits and other industry  
12 statistics. And that's just one document request.

13 And so we, of course, have produced a lot of this  
14 information already for the HomeServices corporate defendants  
15 that overlap between Sitzer and Moehrl, but if we have 12  
16 subsidiaries, we don't think we should have to do that for 12  
17 subsidiaries. We think there should be a more limited  
18 production that is required. And, in fact, in Sitzer, we  
19 agreed to begin producing a much more limited set of material  
20 that basically consists of policies and procedures and  
21 guidelines and training materials and company memos relating  
22 to the challenged restraints and the setting and maintaining  
23 and stabilizing of commission rates or market share, much  
24 narrower than even that one document request.

25 We don't know what the plaintiffs are going to

1 require of us in this broad a market. And that's not true  
2 just for HomeServices. You'll note that the plaintiffs say  
3 that, you know, they've begun to negotiate custodians, but  
4 it's clear that there will be additional custodians for  
5 Re/Max, Realogy and HomeServices of America.

6 And we also don't know -- they say that -- you know,  
7 I think they say on Page 6 the limited additional regional or  
8 sub-specific discovery or subsidiary-specific discovery  
9 doesn't warrant the time that defendants say, but we don't  
10 know what that limited additional regional or  
11 subsidiary-specific discovery would be.

12 If it's limited to what we're already doing in  
13 Sitzer, well, then that's perfectly true, but we don't know  
14 what plaintiffs consider limited, and we don't know what the  
15 scope of that discovery will be. And again, if it's going to  
16 be as broad as the document requests, we're going to have  
17 quite a job in front of us coupled with the commission data.

18 So we're trying to be reasonable, Your Honor. And  
19 I'm not saying we might not be able to do a drop sooner, but  
20 only if we know what the requests are and what the demands  
21 are.

22 And, you know, just to touch on one other thing as  
23 long as I have the floor for a second and I'll give it up,  
24 we've also asked for a more extended date to submit what the  
25 plaintiffs have said are disputes that may have to go to the

1 Court if we can't agree on custodians on the franchisee  
2 discovery and presumably on these document requests; and the  
3 problem is that, again, in Sitzer, we went through these, we  
4 negotiated the document requests at length.

5 It took over 30 days to do it. Even when we reached  
6 an agreement in principle about how we were going to do it, it  
7 took another two weeks to memorialize it, and the plaintiffs  
8 haven't said that they're going to live up to those particular  
9 understandings that we reached.

10 And so what we want is enough time to actually meet  
11 and confer and see what we can do as well as if we can't,  
12 enough time to prepare an appropriate submission to the Court  
13 so it can decide. And right now, plaintiffs' 12/7 date is  
14 five weeks away essentially. We don't know exactly what they  
15 want.

16 It took over 30 days easily to negotiate  
17 HomeServices' custodians in Sitzer. It took, as I just  
18 mentioned, over 30 days to reach agreement on the scope of the  
19 document requests that we'd be producing, and then we'd have  
20 to go out and do all that. So that's why we've asked for the  
21 dates we have, Your Honor.

22 THE COURT: I understand.

23 MR. VARON: Sorry for speaking so long.

24 THE COURT: With respect to the transaction data,  
25 what sort of analysis or review do you need to conduct once

1 the information is gathered?

2 So there was some reference in the status report to  
3 it's going to take all this time to gather the data and then  
4 it's going to take all this additional time to kind of review  
5 it and get it ready for production.

6 So what is it that needs to be done once the raw  
7 information is gathered? And is that something that's being  
8 done in house at the law firms, or is that something that  
9 you're having to hire outside vendors or even people with  
10 particular expertise to do?

11 MR. VARON: So we have an outside vendor, Your Honor,  
12 that's going to retrieve the commission data for us and that  
13 retrieved it in the Sitzer case.

14 And then again, you have to interview the people who  
15 run the accounting systems and the management systems and who  
16 have access to them whether they are vendors or in house or  
17 third party. You have to understand the differences in the  
18 software. And then I think the thing that the consultant  
19 really does is processes the data once you can locate it and  
20 get access to it, and they put it in a form that can be  
21 produced.

22 So all of that occurs, and unfortunately, you know,  
23 it doesn't occur in a uniform fashion. They have to talk to  
24 people at each of the different companies.

25 It's a little smoother -- candidly, Your Honor, it's

1 a little smoother from the franchisee side because the  
2 franchisees are reporting information in a more uniform  
3 manner. So we can probably get the franchise information a  
4 little quicker.

5 THE COURT: Okay. Let me hear from someone on behalf  
6 of the plaintiffs' side -- I don't know which counsel is  
7 prepared to take the lead -- if you'd like to respond to  
8 anything that you just heard from Mr. Varon.

9 MS. FRANKLIN: Good afternoon, your Honor. This is  
10 Beatrice Franklin on behalf of the plaintiffs. I'll respond  
11 to a couple of the points that Mr. Varon made.

12 First, as we note in our papers, it's really just the  
13 HomeServices defendants that seem to have any specific  
14 objections to the discovery deadlines we proposed for our data  
15 production and document production.

16 You know, it is an unusual case in that we're not at  
17 the stage where parties typically would be after a motion to  
18 dismiss has been decided in a complex antitrust action because  
19 of the Sitzer matter.

20 The custodian and search firm negotiations are either  
21 done or very far along. Our subpoenas have already been  
22 served; we've begun negotiating them. Over 700,000 documents  
23 have already been produced. And so plaintiffs' position is  
24 that it's important to keep that overall context in mind when  
25 looking at the discovery deadlines in particular and with the

1 overall case schedule.

2 And Keller Williams and NAR have represented to us  
3 that their production is substantially complete; they don't  
4 anticipate producing a significant amount of additional data  
5 or documents beyond what's been produced in Sitzer.

6 Realogy and Re/Max, our understanding is that they  
7 have some additional geographic-specific and role-specific  
8 discovery that they will need to produce, but it's really just  
9 HomeServices that is seeking these 10 months for discovery.  
10 And, you know, we simply don't think that the entire case  
11 schedule should be held up for nearly a year because of the  
12 decentralization of HomeServices' subsidiaries and  
13 franchisees.

14 In the first place, HomeServices is talking about 12  
15 subsidiaries, it's talking about data collection from its  
16 franchisees; but HomeServices hasn't even agreed to produce  
17 that data to us necessarily.

18 HomeServices has reserved the right to maintain  
19 objections to producing discovery based on all kinds of  
20 reasons such as arbitration agreements, objection to scope or  
21 accessibility to this data.

22 So it seems, I think, difficult to say that they need  
23 10 months when we don't even know how much of that data  
24 they're going to end up agreeing to produce.

25 As far as the HomeServices defendant's concern that

1 we can't set deadlines without knowing what kind of discovery  
2 plaintiffs are seeking, in fact, plaintiffs are seeking the  
3 discovery to which we're entitled under the federal rules.

4         Obviously, we understand that as in any case, there  
5 will be negotiations about what discovery is proportional,  
6 whether we're willing to make certain concessions in terms of  
7 discovery that we're seeking, but it puts the cart before the  
8 horse to say that plaintiffs need to have made all of their  
9 requests and negotiate all of their requests and precisely  
10 articulated the discovery that we're seeking before we can  
11 even set a case schedule. That's not what happens.

12                 Parties set a case schedule, and then the discovery  
13 negotiations take place according to that schedule. And  
14 that's really one of the lessons that we've learned from  
15 Sitzer.

16                 In the Sitzer matter, discovery negotiations in some  
17 cases probably did take longer than they needed to because  
18 there were no firm deadlines. There was not a firm deadline  
19 for document production or data production.

20                 When deadlines were set by the Court in Sitzer or  
21 deadlines to start document production, deadlines to submit  
22 any custodian negotiations, that really speeded those  
23 negotiations along, and it seemed like it helped parties come  
24 to the table and helped the parties reach agreement more  
25 quickly maybe than they otherwise would have.

1           So it's based on that understanding that plaintiffs  
2 feel it's important to set these reasonable but prompt  
3 deadlines in this case.

4           THE COURT: So Ms. Franklin, there's lots of  
5 discussion in the status report about data and document  
6 production. There's not much mention at all of witnesses that  
7 may need to be deposed.

8           When are depositions of fact witnesses -- so putting  
9 aside expert depositions for the moment, when are depositions  
10 of any fact witnesses going to take place, and how has that  
11 been accounted for in the plaintiffs' schedule?

12           MS. FRANKLIN: Those would take place in the time  
13 between the completion of document production and the filing  
14 of our motion for class cert.

15           So if Your Honor looks at our proposal, we have the  
16 deadline for data production is in late February, and  
17 deadlines for document production is in early April. Then our  
18 opening class cert motions aren't due until mid November.  
19 That gives about seven months for depositions to happen.

20           And really, the reason that we need that time, that  
21 time between the data production deadline and the opening  
22 class cert briefs, is because it's going to take a substantial  
23 amount of time for our experts to clean up and work with that  
24 data.

25           You know, we expect that there will be some work in

1 trying to figure out what data is missing, what data is  
2 actually there, formatting the data and making it usable. And  
3 so we believe there's ample time to conduct depositions while  
4 all of that data cleaning and data manipulation and document  
5 work is going on in the background.

6 THE COURT: In order to prepare your class  
7 certification motion, are you going to have to depose somebody  
8 from every single defendant, or is there testimony already out  
9 there from the Sitzer case that might be helpful?

10 How are you approaching it? Just because I can  
11 imagine each subsidiary and potentially each franchisee being  
12 sent a 30(b)(6) notice of some sort. Is that what your  
13 deposition discovery is going to look like?

14 MS. FRANKLIN: I think it's a little early for  
15 plaintiffs to have a set deposition plan in mind without  
16 seeing all of the documents.

17 You know, certainly we would take some depositions  
18 before class cert. I think it's likely that we would maybe  
19 take other depositions, other fact depositions, after class  
20 cert briefing but before merits expert reports and dispositive  
21 motion practice.

22 You know, again, I'm reluctant to bind us to any kind  
23 of discovery deposition plan right now. I would imagine that  
24 we would be seeking deposition testimony probably from -- at  
25 least in some capacity from each of the corporate defendants,

1 but I think it's hard to say in part because depositions have  
2 not yet taken place in Sitzer to my knowledge, certainly none  
3 that plaintiffs in Moehrl have participated in.

4 And defendants are welcome to correct me if any  
5 depositions have been scheduled yet, but I don't believe they  
6 have.

7 THE COURT: And it's not lost on me that one of the  
8 differences between the plaintiffs' proposed schedule and the  
9 defendants' proposed schedule is that the plaintiffs have less  
10 time, significantly less time, I would say, between the  
11 completion of the document production and when class  
12 certification motions need to be filed.

13 So under the plaintiffs' proposed schedule, there's  
14 about seven months, and under the defendants' proposed  
15 schedule, it's more like four and a half, I guess. Or maybe  
16 it's five, but, you know, at least about a month, month and a  
17 half less time.

18 So is the plaintiffs' view that under the defense  
19 schedule, this idea that you would have from August 1st to  
20 January 15th, is that just not enough time?

21 MS. FRANKLIN: Plaintiffs are concerned that that is  
22 not enough time for our experts to do the work that they need  
23 to do with the data and document production in preparation for  
24 their expert reports and class cert briefing while at the same  
25 time also doing any necessary depositions that would need to

1 happen.

2           In the first place, we think that the time that we've  
3 given the defendants to make whatever supplemental productions  
4 need to be made is more than enough, and we also think that  
5 those two months difference between the end of document  
6 discovery and the filing of the class cert motions, we think  
7 those two months do matter, and it's important to plaintiffs  
8 that we retain those in the schedule.

9           THE COURT: I'm not going to ask for defendants' view  
10 on that issue because I'm going to assume that the defendants'  
11 position would be that you could just push back the dates for  
12 the filing of class certification if they still need the time  
13 that they need to produce the documents, and a way to solve  
14 the problem of plaintiffs not having enough time before class  
15 certification would be to push the other dates back.

16           Is that a fair assumption, Mr. Varon?

17           MR. VARON: Yes, Your Honor, that's certainly one  
18 way.

19           You know, I would just say that there's a dichotomy  
20 in plaintiffs' position in that, you know, they talk about  
21 we're not doing this on a clean slate, there's 700,000  
22 documents already produced, but, you know, then other times,  
23 it looks like we are on a clean slate.

24           And the point is that the discovery that plaintiffs  
25 are describing as supplemental, we have no idea whether it's

1 supplemental. I don't think it's supplemental. I hope it is,  
2 but -- and, you know, we may argue that it should be, but  
3 without knowing, it's very difficult to do this.

4 And, you know, we're not saying that you can't set a  
5 case management schedule without this. We can pick briefing  
6 dates right now for class certification, when it will begin;  
7 but we don't necessarily have to have precise deadlines,  
8 especially before we even know, as Ms. Franklin admits, too,  
9 what the scope of the discovery will be, what we're going to  
10 fight on, what we're not going to fight on, what we can agree  
11 to.

12 We've asked for demands on custodians. We got one  
13 demand for seven custodians for Long and Foster which we think  
14 is disproportionate; and we don't know and Realogy doesn't  
15 know and Re/Max doesn't know what custodian requests may be  
16 forthcoming. It's described as limited, it's described as  
17 supplemental, and it should be, but we don't have any  
18 assurance that it will be.

19 THE COURT: Okay. With respect to the timing of sort  
20 of fact and expert discovery relative to the class  
21 certification decision, it wasn't clear to me whether the  
22 parties believe that the class certification decision would  
23 have a material impact on the scope of fact discovery and how  
24 much time would be needed for it.

25 I think there was a suggestion that expert discovery

1 would be materially impacted, but it wasn't clear to me the  
2 parties' positions on fact discovery.

3 So let me start with plaintiffs' counsel and ask is  
4 there any reason why you need to have the class certification  
5 decision before you get to the end of fact discovery?

6 MS. FRANKLIN: Thank you, your Honor. Again, this is  
7 Beatrice Franklin on behalf of plaintiffs.

8 Neither party believes that class and merits  
9 discovery should be or needs to be bifurcated in this case so,  
10 you know, the vast majority of fact discovery we expect will  
11 be completed by the time the class cert briefing happens.  
12 That's not to say that all discovery will happen by then.

13 You know, I can imagine a world in which there will  
14 be certain depositions that will be relevant to our merits  
15 expert reports, you know, that might be relevant, for example,  
16 to evidence of the conspiracy or something along those lines  
17 that wouldn't necessarily be relevant to or wouldn't be  
18 relevant to class cert briefing. And so we might prioritize  
19 leaving those depositions until after the class cert work has  
20 been done.

21 I think that's why both parties have left a little  
22 bit of time after class cert briefing to finish expert  
23 discovery, but plaintiffs certainly would expect that the vast  
24 majority of fact discovery will be completed by the time the  
25 class cert briefing is done.

1                   THE COURT: And is it plaintiffs' view that if your  
2 class certification motion fails and if there's no class  
3 certified, would there be a need for expert discovery?

4                   MS. FRANKLIN: I think that that would -- yeah, I  
5 think that it would be unlikely that if the class  
6 certification motion fails that we would be proceeding with  
7 expert discovery.

8                   THE COURT: And I appreciate that it may turn on the  
9 reason that the class certification motion fails.

10                  MS. FRANKLIN: Yeah.

11                  THE COURT: Okay. What about from the defense side?  
12 I don't know who would be in the best position to take the  
13 lead on this. What's the relationship between the class  
14 certification decision and the scope and timing of fact  
15 discovery?

16                  MS. RENDER: Your Honor, I think I can respond to  
17 that. This is Paula Render, and I represent Re/Max, but I'm  
18 speaking on behalf of the defendants today.

19                  I think I agree with a lot of what -- I'm sorry. I  
20 don't remember Beatrice's last name, but I remember a lot of  
21 what the plaintiffs' counsel just said to the Court.

22                  We haven't bifurcated fact discovery between class  
23 and merits, and so we will have done a lot of the fact  
24 discovery for the merits phase by the time we get to class  
25 certification.

1           I think it would make a lot of sense to evaluate at  
2 the time that the class certification briefs are in what makes  
3 sense at that point because I think the class certification --  
4 obviously, if there's no class certification decision, then we  
5 wouldn't need to do any further discovery, I wouldn't think;  
6 but if we only have a couple of depositions left, it's  
7 possible that the defendants would be willing to just go ahead  
8 and do that to get it done while we wait for the class  
9 certification decision.

10          On the other hand, if there's a ton of fact discovery  
11 that seems that needs to be done, then we might be looking at,  
12 well, what are the issues in the class certification brief,  
13 what really makes sense here in terms of waiting for a  
14 decision versus not waiting for a decision.

15          So I guess I would say that it would make more sense  
16 to decide when fact discovery should close -- well, it would  
17 make more sense to have a status conference after the class  
18 certification briefs are in to see with the benefit of all the  
19 work that the parties have done whether it makes sense to set  
20 a June 24th, 2022, date for fact discovery closing as  
21 plaintiff has suggested or whether it makes sense to do  
22 something else.

23          THE COURT: Okay. Let me switch topics to a  
24 different question I had and direct this towards the  
25 plaintiffs' side. And this has to do with plaintiffs'

1 proposal to brief -- to make expert disclosures on the merits  
2 basically simultaneously with dispositive motions so that  
3 there are merits expert reports which presumably are going to  
4 be relied upon by the plaintiffs for their summary judgment;  
5 or, I guess, depending on who moves first, if I adopt the  
6 plaintiffs' position, the defendants would have to make their  
7 expert disclosures at the same time as their dispositive  
8 motions.

9           I have to say that sounds incredibly inefficient to  
10 me; and one of the biggest problems I see with the plaintiffs'  
11 proposal is that in order for any party to file a summary  
12 judgment motion, they have to believe that the undisputed  
13 facts warrant resolution in their favor of whatever the issue  
14 is.

15           How can you know that a fact is undisputed if you're  
16 going to be supporting it with expert testimony and you  
17 believe that the other side is going to have a responsive  
18 expert in some way?

19           It seems to me that you can't make a good faith  
20 determination on liability issues that are going to be  
21 supported by expert testimony until you've actually seen the  
22 other side because frankly, if you're relying on expert  
23 testimony, it's usually not all that hard to create a disputed  
24 issue of fact.

25           So maybe somebody on the plaintiffs' side can explain

1 to me how that works, the proposal of having the expert  
2 reports disclosed at the same time as the dispositive motions.

3 MS. FRANKLIN: Your Honor, Beatrice Franklin again on  
4 behalf of the plaintiffs.

5 So plaintiffs agree with Your Honor that the key  
6 consideration is efficiency, and so for us, the most important  
7 part of our proposal for merits expert reports and dispositive  
8 motion briefing is that we set firm deadlines now.

9 We think that it absolutely does not make sense to  
10 wait to have a status conference at the end of class cert  
11 briefing as defendants have proposed just now or when there is  
12 a class cert order and then setting deadlines at that point.

13 Because the defendants agree there's no bifurcation  
14 of discovery here, discovery will be nearly completed by the  
15 time class cert briefing is done. It's much more efficient to  
16 proceed directly to merits work at that point when memories  
17 are fresh, when everyone is familiar with the evidence rather  
18 than inject months or even longer of delay into the schedule  
19 for an indeterminate period of time and allow all of that work  
20 essentially to fall by the wayside. That's really the  
21 cornerstone of our merits proposal.

22 As for having a merits report and dispositive motions  
23 submitted at the same time, we think that the parties are  
24 going to be pretty familiar with the issues at that point.  
25 There will have been -- you know, fact discovery will have

1 been fully completed, the parties will have completed class  
2 cert briefing in this case, and then the parties will also  
3 have the benefit of Sitzer.

4           The issues are identical there. You know, if we're  
5 not counsel in Sitzer, it's possible that different issues  
6 will arise, there will be different arguments that are made;  
7 but by the time the merits deadlines roll around, the parties  
8 will know what each other's positions are, they will know what  
9 the issues in the case are, they will know what our experts  
10 are likely to say.

11           So we think that it actually is more efficient to  
12 submit everything at the same time rather than add in an  
13 additional few months of delay to do expert reports first and  
14 then dispositive motion briefing second.

15           It also means that because the parties are responding  
16 to both expert reports and dispositive motions at the same  
17 time, the expert reports are going to be tailored to the  
18 dispositive motion practice so we're not going to be shooting  
19 in the dark to try and think of what the party -- essentially,  
20 expert work isn't going to be completed before the parties  
21 have a chance to see what the summary judgment arguments are.  
22 There's going to be a bit more of a dialogue there so their  
23 expert reports can end up being a little bit more responsive.

24           It's worth noting that the parties agree that that's  
25 how we should structure class work, you know, when it comes to

1 class cert briefing, and we can do reports and dispositive  
2 motions at the same time.

3 THE COURT: But that's not comparable because summary  
4 judgment is very specific in the fact that we're talking about  
5 undisputed material facts. Class certification actually gives  
6 a burden, and I have to weigh evidence and make  
7 determinations.

8 The key difference, as I see it, is I don't see how  
9 you can decide that you have a good faith motion for summary  
10 judgment based on undisputed facts when you haven't seen the  
11 other side's response to your experts yet.

12 MS. FRANKLIN: Again, Your Honor, I think that in  
13 this case, we would be able to understand what facts are in  
14 dispute and what facts aren't based on the way that discovery  
15 has developed and the way that class cert briefing and expert  
16 work has developed.

17 THE COURT: If there's somebody on the defense side  
18 that wants to respond on that point, I'll give you a chance;  
19 and then I think I have just a couple of other questions.

20 MS. RENDER: Thank you, your Honor.

21 This is Paula Render again representing Re/Max and  
22 speaking for all defendants.

23 I think Your Honor identified exactly what the  
24 problem is with this, and I guess I think that these things  
25 are easier to think about with a concrete example than in the

1 abstract so I'd like to -- and this is just an example, you  
2 know, but the definition of the relevant market in which the  
3 case is going to be evaluated is often an issue that courts  
4 resolve on summary judgment, and it could very well be an  
5 issue that defendants would move for summary judgment on.

6 So we would typically already have the plaintiffs'  
7 proposed definition of the relevant market from the  
8 plaintiffs' experts' opinions, and we would then look at that  
9 and say, "Well, do we agree that that's the relevant market,  
10 or do we think that they've done this wrong." And then and we  
11 would file a motion for summary judgment with our opening  
12 brief saying either that we agree with it, or let's assume we  
13 don't, plaintiffs' definition is wrong, they cannot prove  
14 their relevant market definition because of the following.

15 That would be an issue in our summary judgment brief,  
16 but how would we do that with this procedure where we won't  
17 even have seen the plaintiffs' experts' reports at that time?

18 We won't know what their proposed relevant market is  
19 until they file their opposition brief. So essentially, that  
20 means we -- or maybe we just guess at it, we say, "Well, maybe  
21 they're going to say it's this, but that's not right because,  
22 they can't prove that because" and we make a few guesses. I  
23 mean, that's a ridiculous way to proceed through summary  
24 judgment.

25 So for all the reasons you just said, we do need to

1 know, and there are many issues that will not be -- that will  
2 not surface during class certification; they will not be the  
3 subject of expert disclosures that will need to be -- have  
4 expert support and then be briefed in summary judgment or  
5 tried at a trial. So we will not know what plaintiffs'  
6 position is on many, many issues when we get to the end of  
7 class certification.

8 And I'd like to say, you know, I've been litigating  
9 for 25 years. I do nothing but antitrust litigation. I've  
10 been in many class actions. I have several partners who have  
11 similar experience. None of us has ever seen the expert  
12 disclosures made along with the summary judgment motion  
13 where -- (inaudible).

14 THE COURT REPORTER: You're cutting out. Judge, we  
15 lost part of that.

16 THE COURT: I'm sorry. I think we may be losing you.  
17 I think you came in and out, and I think our court reporter  
18 may have lost track of what you were saying as well. Maybe  
19 you could back up a sentence or two. Can you repeat what you  
20 were saying?

21 MS. RENDER: Sure. Absolutely, Your Honor. And  
22 thank you for letting me know.

23 I've never seen a case like this, a schedule like  
24 this where the summary judgment motion briefs are filed  
25 simultaneously with expert disclosures. I've never seen that,

1 none of my colleagues have ever seen that, and all we do is  
2 antitrust litigation.

3 We looked for cases in which courts applied that kind  
4 of a schedule; we couldn't find any. Plaintiffs haven't cited  
5 any. They have not cited any cases in which judges said,  
6 "Yes, make your expert disclosures at the same time as your  
7 summary judgment briefs." And I think that's because it just  
8 makes no sense.

9 It essentially renders the defendants' opening briefs  
10 irrelevant and then only gives them the reply brief in which  
11 to try and tackle all of the new expert disclosures that  
12 they've never seen before, you know, in that short a period of  
13 time and that generally fewer number of pages, and then the  
14 plaintiff gets to come back.

15 And so it essentially robs the defendants of the  
16 opportunity to make the full summary judgment motions that  
17 they are entitled to make on the issues where the plaintiffs  
18 are disclosing expert opinions for the first time.

19 So I think this procedure is never done. We would be  
20 going way out on a limb with a very novel kind of schedule for  
21 which I haven't heard any real benefit other than, you know,  
22 maybe it takes a month or two out of the schedule.

23 And, you know, we could take all of the procedure out  
24 of it. I mean, we have to do things; they take some time. We  
25 can't just short circuit things and take summary judgment away

1 from the defendants just because we'd like to take a month out  
2 of the schedule.

3 THE COURT: Okay. With respect to the overall fact  
4 discovery schedule, putting aside the intermediate dates for a  
5 moment, the plaintiffs have proposed fact discovery to close  
6 June 24th of 2022.

7 I guess all other things being equal, do the  
8 defendants disagree that that's enough time for fact discovery  
9 in general? I mean, that's, you know, a good amount of time  
10 from now, about a year and a half, I guess, from where we are  
11 now, to complete fact discovery.

12 So putting aside for the moment how all the pieces  
13 fit together in terms of whether class certification takes  
14 place first or after, is a year and a half enough time to  
15 complete fact discovery here?

16 MS. RENDER: Your Honor, Paula Render.

17 I can only speak for my client on this point so you  
18 may have to canvass the defendants on this point.

19 I think that we really ought to look at what fact  
20 discovery is needed once a class certification decision has  
21 been made because that class certification decision may very  
22 well change the parties' views.

23 If the plaintiffs' class definition includes all  
24 persons who have paid commissions in connection with  
25 residential real estate, that would be buyers and sellers, but

1 perhaps buyers don't get included in the eventual class  
2 decision. That might change the discovery that people think  
3 they need with respect to the rest of the case or perhaps  
4 certain kinds of sellers but not others, certain kinds of  
5 buyers, not others.

6 I mean, the class certification decision itself  
7 really could affect what discovery people need. Maybe they  
8 think they need yet another deposition of this type of seller  
9 or something. So I would say that at least for my client, we  
10 would stick with the proposal that was made in the defendants'  
11 proposed schedule, and we would say that decision really  
12 should be made after the class certification decision is made.

13 THE COURT: Okay. Any response to that from the  
14 plaintiffs' side?

15 MS. FRANKLIN: Yes, Your Honor. Beatrice Franklin  
16 again on behalf of the plaintiffs.

17 I think that it's possible, although plaintiffs  
18 obviously think it's likely, that the class cert order could  
19 narrow the scope of needed discovery; but it seems extremely  
20 unlikely that the class cert order would expand the scope of  
21 discovery beyond what plaintiffs believe proper discovery is  
22 in this case already.

23 And again, because defendants haven't argued that we  
24 should be bifurcating fact discovery based on merits and class  
25 discovery, discovery is presumptively proceeding on the whole

1 scope of plaintiffs' case. So there's simply -- there's no  
2 reason to hold aside some portion of fact discovery with the  
3 idea that the class cert order might end up limiting the scope  
4 of the class. That's not how -- it's certainly not how  
5 plaintiffs' plans for discovery will proceed. We're going to  
6 take the discovery that we're entitled to take.

7           And so if the class cert order necessitates maybe one  
8 or two additional depositions or something like that, we can  
9 work that out when the time comes, but the fact is that the  
10 scope of the case is defined, and discovery should proceed as  
11 it has already in Sitzer. And there's no reason that a year  
12 and a half isn't enough time to get that discovery done.

13           THE COURT: Okay. So here are my thoughts, having  
14 considered what the parties have put in writing and what  
15 you've told me today. One, I'm inclined to at least with  
16 respect to some of the initial dates, with respect to the  
17 dates for the parties to agree to the ESI terms, the custodian  
18 and also to submit any disputes to the Court for resolution,  
19 I'm going to be inclined to go with the January 8th date  
20 proposed by the defendants in part because I think  
21 December 7th is just going to come up awfully quickly from  
22 where we are. And based on what I've heard from the parties  
23 and where you are in that process, it strikes me as perhaps  
24 not realistic to think that you would be able to get to  
25 whatever you're able to agree on and identify disputes that

1 need the Court's help by December 7th.

2           With respect to the other dates, I'm going to give  
3 some thought to the specific dates and issue a scheduling  
4 order separately.

5           In general, my thought is this. One, I think that  
6 the amount of time that's being provided to the plaintiffs  
7 after the completion of the document production in order to  
8 get to the filing of class certification and to get the class  
9 expert reports prepared and ready to be filed at the same time  
10 is perhaps a little unreasonable under the defendants'  
11 schedule. I think a little more time needs to be there.

12           So the question is do the defendants really need as  
13 much time as they are proposing in order to get their document  
14 production complete, you know, which from today is another  
15 nine months from where we are, or does the schedule shift  
16 otherwise.

17           I suspect that what will end up happening is a  
18 schedule that has the filing of the class certification motion  
19 and expert reports a little closer to the defendants' date but  
20 allowing a slightly shorter period of time for the defendants  
21 to complete their document production and a little bit more  
22 time for the plaintiffs to get to prepare what they need to  
23 prepare. I haven't quite decided how I want to break that  
24 down. I'll give it some thought and issue a separate order.

25           I will let the parties know my inclination is going

1 to be to set a fact discovery deadline and to set it for,  
2 I think, shortly after the briefing of class certification  
3 would be complete.

4 I think the plaintiffs have a reasonable approach in  
5 setting an actual fact discovery deadline. In their proposal,  
6 it's about six weeks after the class certification and related  
7 expert issues are fully briefed. I think that is a fairly  
8 reasonable way to do it.

9 I also think that if there are issues that require  
10 additional fact discovery after the class certification  
11 decision is raised, if there really is something that has  
12 changed about the scope of what's necessary, I would like to  
13 think that the Court would be reasonable in allowing a limited  
14 time for specific issues to be addressed that come out of the  
15 class certification ruling.

16 So the parties should expect that there will be an  
17 actual fact discovery deadline. It will be after briefing of  
18 class certification, and it will be set.

19 With respect to expert reports, I again tend to agree  
20 with the defendants' approach that I think you need to have  
21 the expert reports on the merits before dispositive motions  
22 are filed.

23 I don't see how you can file a proper dispositive  
24 motion where you're relying on your own expert report and you  
25 haven't seen the other side's, especially in a case such as

1 this where the parties are going to be relying, I think,  
2 fairly heavily on expert testimony for issues related to  
3 summary judgment.

4 It just strikes me as not the way summary judgment is  
5 supposed to work. I don't think it's the way that it should  
6 work in a case such as this, meaning either an antitrust case  
7 or a class action case, and certainly not a class action  
8 antitrust case. I think you're going to need to have that  
9 expert discovery complete before dispositive motions.

10 I am concerned about stretching out the schedule  
11 beyond what's absolutely necessary given the timing of the  
12 case and the fact that this is certainly a case where there  
13 could be a snowball effect in terms of dates getting pushed  
14 further and further out.

15 So my inclination, I think, is going to be to set  
16 some dates regarding expert discovery and perhaps even a date  
17 for filing of dispositive motions that tries to take into  
18 account a reasonable timeline for a ruling on the class  
19 certification decision and takes into account the fact that  
20 the parties may need to make a motion to adjust some things  
21 based on the outcome of that ruling.

22 So I think that's generally going to be the approach  
23 that I'm going to take. I'll issue a scheduling order after  
24 I've had a chance to pencil in the dates to see where I think  
25 they properly fall.

1           In the short term, you should all be planning on  
2 getting the 26(a) disclosures and answers due on November 16th  
3 and working on working out those ESI search terms and  
4 custodian issues so that those can be properly resolved or  
5 teed up by January 8th.

6           My expectation is that things will be off and running  
7 after the first of the year with producing a lot of  
8 information at a pretty efficient pace.

9           We've only talked about the schedule itself. The  
10 parties didn't really identify any other issues that you  
11 wanted to put on the agenda for today so let me first find out  
12 if there's anything that's happened in the Sitzer case that I  
13 should be aware of or that impacts any of these scheduling  
14 considerations, and then I'll see if there are any other  
15 issues that the parties generally want to touch on before I  
16 set some next dates here.

17           So who is in the best position to tell me if there's  
18 anything going on with the Sitzer case that I should be aware  
19 of?

20           MS. RENDER: Your Honor, this is Paula Render, and I  
21 can offer that there have been no real developments in the  
22 Sitzer case. Discovery continues; our dates have stayed the  
23 same; and we're just continuing to work through the schedule.

24           THE COURT: Are there any issues that any of the  
25 defense counsel wanted to address that we haven't touched on

1 today?

2 We'll start with Ms. Render since you are taking the  
3 lead on a lot of the issues.

4 MS. RENDER: Thank you, your Honor.

5 No, there is nothing that I -- nothing else that I  
6 want to raise.

7 THE COURT: Okay. Mr. Varon, any other issues from  
8 your clients?

9 MR. VARON: I don't think so, Your Honor. Thank you  
10 very much.

11 THE COURT: Okay. Any of the other defense counsel  
12 who haven't had a chance to weigh in today who would like to  
13 put an issue on the table?

14 MR. KLIBEARD: Just very briefly, Your Honor. This  
15 is Ken Kliebard for Realogy.

16 There is just one sort of note at the end of the  
17 status report that we are working on a deposition protocol,  
18 and the update on that is we hope to provide that to  
19 plaintiffs this week.

20 As I'm sure you can imagine, it's quite complicated  
21 just because all the depositions will likely be remote. So we  
22 are making progress on that and hope to have resolution on  
23 that within the next week or so.

24 THE COURT: Have the parties agreed on a platform?  
25 In other words, are you planning to use Zoom or, you know,

1 Microsoft Teams? What sort of platform do you all have access  
2 to, and are you all comfortable with it?

3 MR. BRAUN: Your Honor, this is Robbie Braun speaking  
4 for the plaintiffs.

5 I don't believe that we have reached an agreement on  
6 a platform yet, though I think the defendants did reach out to  
7 us about starting discussions on potentially agreeing to one  
8 platform that both sides would use for depositions.

9 MR. KLIEBARD: Your Honor, again, this is  
10 Ken Kliebard.

11 We have interviewed and received demonstrations from  
12 a couple of vendors, and I think they tend to use a Zoom-based  
13 platform. It's not Zoom, it's powered by Zoom, whatever that  
14 means, but it's a more secure enterprise-level platform. And  
15 so we'll share what we have with plaintiffs including our  
16 recommendations on which services we thought did the best job  
17 in terms of giving us a demonstration.

18 THE COURT: And are you also discussing a protocol  
19 for the use of documents during depositions and how that's  
20 going to occur remotely?

21 MR. KLIEBARD: Your Honor, again, it's Ken Kliebard.

22 That will be part of the protocol. That's one of the  
23 challenging issues, and the different vendors each have  
24 different approaches on that so we've actually been trying to  
25 get some hands-on experience to see which is least cumbersome

1 for remote depositions, and again, we'll be discussing that  
2 with plaintiffs this week, we hope.

3 THE COURT: Finally, what about the cost of utilizing  
4 this vendor? Have the parties reached an agreement on sharing  
5 the cost, or is one side or the other going to bear the  
6 expense either overall or for depositions that you notice or  
7 of your clients? How will that work?

8 MR. KLIEBARD: Again, it's Ken Kliebard.

9 We haven't discussed that. I think it will work  
10 similar to a regular deposition so I think the party that  
11 notices the deposition will have the initial burden of the  
12 cost of the videographer, if you will, and the court reporter,  
13 but we did receive pricing proposals which we've been actually  
14 trying to negotiate down to save us and the plaintiffs money.  
15 And we will share those pricing proposals with plaintiffs when  
16 we have our discussion with them this week.

17 THE COURT: Okay. Good. Well, I'm glad that you are  
18 working on that and that you are not waiting until the eve of  
19 when you're planning to start depositions to start looking for  
20 a vendor. I think that's a good approach, a necessary  
21 approach, under the circumstances.

22 Okay. Thank you. Thank you for letting me know what  
23 was going on with that.

24 Any other issues that any of the other defense  
25 counsel would like to raise?

1                   Not hearing anything, what about any other issues  
2 from the plaintiffs' side?

3                   MS. FRANKLIN: Your Honor, this is Beatrice Franklin  
4 for the plaintiffs.

5                   I just wanted to flag one issue related to the  
6 scheduling proposal that was in a footnote in the status  
7 report that I just wanted to flag.

8                   If Your Honor is thinking about dates for the  
9 scheduling order, we do request that the Court make the  
10 deadline for briefings and expert reports roughly even on each  
11 side. This was a bit of an issue with respect to the parties'  
12 proposals for class cert briefing.

13                  In our proposal, I think each side got basically two  
14 months to submit responsive or rebuttal reports. The  
15 defendants wanted to have two and a half months for theirs and  
16 then reduced our time to one and a half months.

17                  We're fine giving the defendants two and a half  
18 months, but we would just request that the Court give us at  
19 least two months to respond or give even time with whatever  
20 the Court ends up doing with the briefing schedule.

21                  So that's the only other issue we would like to put  
22 on the table.

23                  THE COURT: Okay. Who on the defense side would like  
24 to respond to that? Was your original schedule unfair to  
25 plaintiffs and not giving them equal time to respond?

1 MS. RENDER: Your Honor, I don't think there was.

2 I guess I'm unfortunately having a little bit of  
3 trouble following -- I see what we're saying.

4 The plaintiffs have seven months to prepare their  
5 opening class certification motions. Defendants then have six  
6 weeks with two and a half months to prepare their response,  
7 and then the plaintiffs have one and a half -- six weeks to do  
8 their reply briefs, and I guess I don't see that as an unfair  
9 amount of time.

10 I mean, the plaintiffs have a huge amount of time to  
11 prepare their opening briefs, and we're not asking for that  
12 much time, of course. And so the reply briefs usually get a  
13 shorter amount of time, but if Your Honor feels that it's more  
14 fair to give them more time for their reply, I would just ask  
15 for the same kinds of intervals to be applied to the summary  
16 judgment motions as well if we're going to set dates certain  
17 for the summary judgment motions.

18 MR. BRAUN: Your Honor, this is Robbie Braun for the  
19 plaintiff. I just want to clarify one thing.

20 Our concern isn't about the time that we as attorneys  
21 have for filing our reply. Our concern is the time that our  
22 experts have to receive and analyze and respond to the  
23 defendants' expert reports.

24 So the defendants insisted when we were agreeing on  
25 an expert protocol that they have up to, I think, five days to

1 even provide to our experts the backup data that their experts  
2 are using. So our experts effectively don't even have six  
3 weeks; they'll have just a little bit over five weeks.

4           And then once they get that data which is likely to  
5 be fairly voluminous in this case, you know, they'll go  
6 back and try to understand what defendants' experts' analysis  
7 of the transactional data and sophisticated regression models,  
8 et cetera, are in this case, and then they'll have to respond  
9 and rebut to any points that defendants' experts have made  
10 based on those models. And that takes time, and that's why  
11 defendants have asked for two and a half months to effectively  
12 conduct that analysis with respect to our experts. And so our  
13 experts have asked that they have at least two months to do  
14 the same.

15           THE COURT: I see. Okay.

16           MS. RENDER: Your Honor, I'll say this.

17           I certainly think the plaintiffs should have a fair  
18 amount of time, and if they don't feel like the schedule  
19 provides enough time, then, you know, I don't think defendants  
20 have any objection to giving them some more time.

21           I will note for the record that we did not insist on  
22 five days. That was negotiated, and we don't really have the  
23 power to force plaintiffs to agree to anything or to insist on  
24 anything. I'm just saying that to defend our honor, but in  
25 terms of the amount of time they get, I certainly think they

1 should be provided a fair amount of time.

2 THE COURT: Okay. Duly noted. I will take all of  
3 that into account.

4 I think the goal should be for each side to have a  
5 fair amount of time here. I think each side is going to be  
6 doing comparable work, at least your experts will be doing  
7 comparable work. The data may be coming from largely the  
8 defense side, and so there's more production work on that  
9 side; but in terms of the expert analysis, I think it's fair  
10 to make sure that they have comparable amounts of time to do  
11 the work that they need to do.

12 Okay. I'm going to get the scheduling order entered  
13 for the parties by tomorrow. The answer is going to be filed,  
14 the ESI.

15 I think what I would like to do is to set another  
16 telephonic status hearing, and I think given where we are in  
17 the year and where you're going to be in your process that I'm  
18 going to set that hearing for mid January, and I'm going to  
19 direct that the parties file a status report.

20 Let's file the status report by January 8th which is  
21 going to give me a written update on where you are with  
22 respect to discovery including your electronic discovery.

23 Since that's also going to be the date by which any  
24 disputes regarding the ESI terms and custodians will need to  
25 be identified for the Court, if you're going to need Court

1 intervention, the status report will give you an opportunity  
2 to do that, to both confirm that you've completed that first  
3 step in the discovery process and to identify at that point  
4 what, if any, disputes you're aware of that are going to need  
5 resolution and also whether there are any hiccups that have  
6 come up in connection with your early discovery process that  
7 might throw off the plans for the remainder of the schedule.

8 So let's go ahead and say that that status report  
9 will be filed January 8th. And then I'll set a telephonic  
10 status hearing for mid January to address any issues that are  
11 raised in that report.

12 David, can you give us a date and time?

13 THE CLERK: We can do January 14th at 11:00.

14 MS. MAHONEY: This is Stacey Mahoney on behalf of  
15 Realogy.

16 With all due respect, I have a conflict with another  
17 court at that time so I apologize. If we could perhaps set a  
18 different date for the status hearing, I'd be very  
19 appreciative.

20 THE CLERK: January 19 at 11:00.

21 THE COURT: Does that work for Counsel?

22 MS. MAHONEY: Yes, Your Honor, it does.

23 THE COURT: January 19th which is a Tuesday. I'm  
24 guessing that that Monday is the long holiday weekend and the  
25 19th is a Tuesday. At 11:00 a.m.

1           I'll get your status report. Obviously, if there are  
2 issues that come up in the interim, you can either request an  
3 earlier status date or file a motion to get something resolved  
4 that needs to be resolved. I look forward to getting the  
5 answers.

6           Are the parties going to be putting together a  
7 stipulation regarding the deposition protocol at some point,  
8 and would you like to have that reflected on the docket?

9           It might be a good idea just in case there are  
10 disputes to have something actually signed off on by the Court  
11 and filed as a stipulated order in case you have any disputes  
12 over how depositions proceed.

13           MR. KLIEBARD: Your Honor, it's Ken Kliebard again.

14           I think that's a good plan. Just to be clear, we  
15 will provide the plaintiffs with a draft of the completed  
16 stipulation, and for the reasons you stated, I do think it  
17 would be helpful to have that order entered in the docket.

18           THE COURT: Okay. And so you can include in your  
19 status report -- if you haven't by then submitted a  
20 stipulation for a protocol on deposition discovery, you should  
21 provide a status update on where you are in that negotiation.

22           I'm assuming that you're not going to be ready to  
23 take depositions by January 8th so that should allow time for  
24 you to kind of work out any remaining issues or disputes.

25           It is not usually my practice, by the way, to put

1 even tentative trial dates on my trial calendar so early in  
2 the process or at least not as early as we are here because I  
3 treat my trial dates as real, firm dates, and I like to be  
4 realistic about the possibility that things will change,  
5 especially when you're talking about litigation that's going  
6 to go on for a couple of years before you get to that trial  
7 date.

8         This, however, is a situation where I would expect  
9 sort of pencilling in on calendars a trial date perhaps a  
10 little sooner than I would normally in part because of the  
11 number of attorneys who may need to be involved and to work  
12 and to schedule and because of the fact that I would expect  
13 witnesses to be coming from multiple places and the need to  
14 plan ahead.

15         So once dates are set and a scheduling order and as  
16 we get a little closer to actual dispositive motions down the  
17 line, I will be approaching the parties about a realistic time  
18 frame for trial probably sooner than I might otherwise.

19         You shouldn't expect to see a trial date in the  
20 scheduling order that you're going to get this week, but just  
21 to let you know that it is in the back of my mind and it will  
22 be set in sufficient time for everybody to plan accordingly.

23             MR. BRAUN: Thank you, your Honor.

24             This is Robbie Braun.

25             There was one final issue that we were hoping to

1 raise, and I think we can address it probably pretty quickly.

2 At the last hearing, Your Honor stated that you  
3 didn't see any reason why discovery wouldn't go forward, and  
4 since that hearing, plaintiffs have begun negotiating  
5 Moehrle-specific discovery with several of the defendants. We  
6 just want to clarify those so there's no room for confusion or  
7 doubt that the discovery stay has, in fact, been lifted.

8 THE COURT: Yes, discovery should be proceeding so  
9 you should be proceeding with discovery. I don't know if you  
10 need any more clarification than that.

11 And, you know, the dates that are going to be in the  
12 scheduling order are deadlines by which things need to be  
13 completed. So at this point, particularly now that you've had  
14 a very fulsome planning meeting on discovery and your initial  
15 disclosures are forthcoming in two weeks, the parties should  
16 move forward expeditiously with discovery. You don't have to  
17 wait until the latest date to do something in order to get it  
18 complete. So keep that in mind.

19 And I will be in the status reports that I asked the  
20 parties to file asking for updates on what you've been able to  
21 accomplish since the last status report. So hopefully, you  
22 will always have something to report in terms of progress.

23 MR. BRAUN: Thank you, your Honor.

24 THE COURT: Okay, Counsel. Thank you for answering  
25 my questions, and hopefully, you'll get off and moving.

1 Did somebody else have something to raise?

2 Okay. Thank you, Counsel. I think that's all for  
3 today.

4 Have a good afternoon. Court is adjourned.

5 (Proceedings adjourned at 2:48 p.m.)

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## C E R T I F I C A T E

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I, Brenda S. Tannehill, certify that the foregoing is  
a complete, true, and accurate transcript from the record of  
proceedings on November 2, 2020, before the  
HON. ANDREA R. WOOD in the above-entitled matter.

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10 || /s/Brenda S. Tannehill, CSR, RPR, CRR

11/3/2020

11       Official Court Reporter  
12       United States District Court  
         Northern District of Illinois  
         Eastern Division

Date

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